

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34875

JOEY T. STAKEY,)	2009 Unpublished Opinion No. 490
)	
Petitioner-Appellant,)	Filed: June 5, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Order of the district court summarily dismissing application for post-conviction relief, affirmed in part, reversed in part, and remanded.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Joey T. Stakey appeals from the summary dismissal of his application for post-conviction relief. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

Stakey pled guilty to first degree arson regarding a fire at a restaurant. Idaho Code § 18-802. The district court sentenced Stakey to a prison term of twenty-five years with ten years determinate. Stakey filed an application for post-conviction relief claiming ineffective assistance of counsel on several grounds. The district court granted Stakey's claim that his counsel was ineffective for failing to file a direct appeal and dismissed the other claims. Stakey filed a motion for reconsideration which was denied on all grounds except for a claim that his counsel was ineffective for failing to call mitigation witnesses during sentencing. However, the district court concluded that Stakey had failed to demonstrate prejudice by counsel's failure to call

additional witnesses. Stakey appeals, claiming that the district court erred in dismissing his ineffective assistance of counsel claims for failure to file a motion to suppress and failure to investigate the facts of the case and/or defenses resulting in a guilty plea which was not knowingly, intelligently, or voluntarily made.

II.

ANALYSIS

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than “a short and plain statement of the claim” that would suffice for a complaint under Idaho Rule of Civil Procedure 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court’s own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant’s evidence has raised no genuine issue of material fact that, if resolved in the applicant’s favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant’s evidence because the court is not required to accept

either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of an application for post-conviction relief without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

A. Failure to File Motion to Suppress

Stakey was interrogated by the police on two occasions and made two conflicting statements regarding what happened on the night in question. The first statement was that another person had started the fire. The second statement was that he had accidentally started the fire. However, prior to making the second statement, Stakey requested an attorney. In his application for post-conviction relief, Stakey claimed that his counsel rendered ineffective assistance for failing to file a motion to suppress the second statement. The district court summarily dismissed this claim. On appeal, Stakey claims that he was provided inadequate notice of the basis for summary dismissal because the district court dismissed the claim on a ground not raised by the State. Alternatively, Stakey claims that the district court erroneously held that he was not prejudiced by counsel's failure to file the motion to suppress.

If the State moves to dismiss an application for post-conviction relief under I.C. § 19-4906(c), the court cannot dismiss a claim on a ground not asserted by the State in its motion unless the court gives the applicant the twenty-day notice required by Section 19-4906(b). *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995).

In its brief in support of summary dismissal, the State argued, "Stakey has failed to support his allegation with evidence that would be admissible at a post-conviction evidentiary hearing and that would establish both prongs of the *Strickland*¹ test . . . Stakey has failed to show that trial counsel's alleged failure to file a motion to suppress both constituted deficient performance and resulted in prejudice." These allegations raised the issue of the sufficiency of Stakey's evidence to support the claim. However, the State's argument was centered on the contention that Stakey's right to counsel during the interrogation had not been violated and, thus,

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

Stakey could show neither ineffective assistance for failure to file a suppression motion nor prejudice, since any such motion would fail. At the hearing on the motion for summary dismissal, the State, for the first time, admitted that Stakey's right to counsel had been violated and that the motion to suppress would have been successful. However, the State argued that even if the statement would have been suppressed, Stakey had not shown that he would not have pled guilty and would have insisted on going to trial and, therefore, had not shown prejudice. At the hearing, Stakey's counsel did not object to the change in focus of the State's argument and, instead, argued that Stakey had demonstrated prejudice.

The district court issued a written opinion finding that counsel's failure to bring the motion to suppress was objectively unreasonable conduct on the part of counsel but that Stakey had not been prejudiced because he had failed to adequately demonstrate that he would not have pled guilty to the crime even if the admission had been suppressed. Stakey filed a pro se motion for reconsideration. In his memorandum in support of the motion, Stakey asserted that the court erred in finding no prejudice and that he had shown prejudice in that had the statement been suppressed, he would not have pled guilty to the charged offense. After having counsel appointed, Stakey filed another memorandum noting that the court had, upon the State's concession, found that counsel's performance was deficient, but argued that Stakey had demonstrated prejudice, contrary to the court's finding. The district court considered and denied the motion for reconsideration regarding this claim.

We need not determine whether the district court initially dismissed the claim on a ground not asserted by the State in its motion, or whether Stakey failed to preserve the right to appeal by failing to object to the notice at the hearing. Assuming, without deciding, that the initial decision of the district court was based upon a ground not asserted in the State's motion, and therefore violated the notice requirement of I.C. § 19-4906(b), any such notice violation was cured by the subsequent consideration of the issue on the timely motion for reconsideration. In such case, the district court's initial order served as notice to Stakey of the proposed basis for dismissal. Stakey directly addressed the district court's reason for dismissal in his motion for reconsideration. The district court considered Stakey's arguments regarding prejudice and, again, denied relief. Under these circumstances, adequate notice was provided under I.C. § 19-4906(b). *See State v. Ochieng*, Docket No. 34755 (Ct. App. April 28, 2009) (*review pending*); *Isaak v. State*, 132 Idaho 369, 370 n.2, 972 P.2d 1097, 1098 n.2 (Ct. App. 1999).

Next, Stakey claims that the district court erred in its determination that Stakey was not prejudiced by his counsel's deficient performance in failing to file a motion to suppress. A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. at 687-88; *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.*

As noted, the State conceded below that Stakey's rights were violated by the interrogation, that a motion to suppress the second statement would have been successful and that Stakey's counsel rendered deficient performance in failing to bring the motion to suppress. The State, however, argued that Stakey had not shown that he would have insisted on going to trial if the statement had been suppressed and, thus, had not demonstrated prejudice. The district court held:

However, the failure of Petitioner's counsel to bring a suppression motion simply satisfies the first prong of the *Strickland* test, objectively unreasonable conduct on the part of counsel. The second prong, specifically in cases where the petitioner has pled guilty, requires the Petitioner to demonstrate that he would not have pled guilty and would have insisted on going to trial. The State had two credible witnesses to identify the petitioner leaving the scene of the crime. Faced with the strong evidence against him, the Petitioner has not adequately demonstrated that he would not have pled guilty to the crime even if the admission had been suppressed. This claim is therefore without merit and is therefore dismissed.

The statement which Stakey's counsel failed to suppress, that he set the fire by accident, was in the nature of a confession. In fact, it was an admission of not only being at the scene, but of causing the fire. At the hearing on the motion for summary dismissal, Stakey's counsel pointed out that the damaging effect of this type of admission at trial is greater than an admission, like Stakey's first statement, that he was there but someone else started the fire. The State, at the change of plea hearing specifically referenced the statement, among other things, in its recitation to the court of the factual basis for the guilty plea. Stakey's trial counsel, in his affidavit, merely stated that he did not see a basis for the motion. He does not comment on what impact, if any, a successful motion to suppress would have had on his advice to Stakey. While the district court referenced the "strong evidence" against Stakey, the court did not specify what that evidence consisted of, other than reference to two witnesses. In regard to the two witnesses, the district court found them to be "credible," but neither witness had testified in any proceeding from which the court could make a credibility determination. Stakey's mother averred that Stakey talked about taking the case to trial, although not specifically in relation to the suppression motion issue. Stakey asserted that he would not have pled guilty, but for his counsel's error, and that he desired to proceed to trial. While an applicant's mere self-serving assertion that he would not have pleaded guilty absent the mistake of counsel need not be accepted by the trial court sitting as a fact finder, *McKeeth v. State*, 140 Idaho 847, 852, 103 P.3d 460, 464 (2004); *Hayes v. State*, 143 Idaho 88, 93 137 P.3d 475, 480 (Ct. App. 2006), under the circumstances of this case, we conclude that Stakey raised a genuine issue of fact and, therefore, summary dismissal was inappropriate. While we express or imply nothing in regard to the eventual outcome, we remand this matter for an evidentiary hearing on the issue of prejudice relative to the claim of ineffective assistance of counsel for failing to file the motion to suppress.

B. Failure to Investigate the Facts of the Case and Potential Defenses.

Stakey claimed that he received ineffective assistance of counsel because his trial counsel failed to investigate the facts of the case and/or his defenses. Stakey contends that because his attorney erroneously believed his admission would not have been suppressed, he failed to investigate the facts and defenses of his case. He acknowledges that the defense team investigated the statements of witnesses and an alternative theory that someone else committed the crime. This was because Stakey claimed he was innocent. In fact, in his application for post-conviction relief, he sought relief for alleged failure of counsel to adequately prepare regarding Stakey's assertion of innocence. However, Stakey's private investigator determined that Stakey's claim of innocence was false. Now, Stakey asserts that there is no evidence from his former counsel that, instead of pursuing the theory someone else did it, that he investigated the "defense every defendant in America has a constitutional right to pursue," of having the State prove its case beyond a reasonable doubt.

Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Stakey did not advance a failure to investigate reasonable doubt claim below. In fact, the district court held:

Because the Petitioner has failed to demonstrate what a more thorough investigation of the case would have revealed, the claim based on this failure is dismissed as well. *See, e.g., U.S. v. Olson*, 846 F.2d 1103, 1109 (7th Cir. 1988) ("in order to establish prejudice resulting from a failure to investigate, the defendant must make a comprehensive showing of what the investigation would have produced.").

While Stakey claims that his former counsel did not state in his affidavit what specific efforts were undertaken to investigate making the State prove its case beyond a reasonable doubt, Stakey has failed to make any showing of what the investigation would have produced. Moreover, proof beyond a reasonable doubt is a burden placed on the State, not a defense. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). The district court did not err in dismissing this claim.

III.

CONCLUSION

Stakey was provided adequate notice of the district court's basis for dismissal of the claim of ineffective assistance of counsel for failure to file a motion to suppress. Stakey failed to

raise a genuine issue of material fact regarding his claim of ineffective assistance of counsel for failure to investigate the facts of the case and/or his defenses. Stakey has raised a genuine issue of material fact regarding his claim of ineffective assistance of counsel for failure to file a motion to suppress. The district court's summary dismissal of Stakey's application for post-conviction relief regarding his claim of ineffective assistance of counsel for failure to investigate the facts of the case and/or his defenses is affirmed. The district court's summary dismissal of Stakey's application for post-conviction relief regarding his claim of ineffective assistance of counsel for failure to file a motion to suppress is reversed and remanded for an evidentiary hearing.

Judge PERRY and Judge GUTIERREZ, **CONCUR.**